IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Respondent.

Case No. 1:10-mc-109
HON. GORDON J QUIST

PROPOSED INTERVENING RESPONDENTS' MEMORANDUM OF LAW IN RESPONSE TO THE UNITED STATES' "ANSWER TO MOTION TO INTERVENE"

The Michigan Association of Compassion Clubs and John/Jane Does 1 - 42 (hereinafter: Applicants) submit this supplemental memorandum of law in response to the United States' "Answer to Motion to Intervene." In addition to the following arguments, Applicants pray that this Court incorporate the arguments offered within their original motion to intervene as well as Cannabis Patients United's and Americans for Safe Access' amicus briefs.

I. THE UNITED STATES IS ALREADY VOLUNTARILY NARROWING THE SCOPE OF THE DEA SUBPOENA PRIOR TO THIS COURT EVEN ISSUING A RULING REGARDING WHETHER THE APPLICANTS WILL BE GRANTED STANDING AND ALLOWED TO INTERVENE IN THIS CASE

As an initial matter, this Honorable Court should heavily consider the extraordinary and voluntary concessions made by the United States to narrow the scope of the Drug Enforcement Administration's (DEA's) overly-broad and unreasonable subpoena at issue in this case.

The Drug Enforcement Administration issued their subpoena at issue in this case on June 6, 2010; while Mike Cox was still serving as Michigan's Attorney General. Upon information and belief, AG Mike Cox's office advised the recipient of the DEA's overly-broad subpoena, Michigan's Department of Community Health (MDCH), to not to comply with its demands. The United States tactically delayed the filing of their petition to enforce the DEA's subpoena until December 22, 2010 - just a few days before Michigan's newly elected Attorney General, Bill Schuette, was sworn into office.

As detailed more fully in Applicants' original motion to intervene, AG Schuette has made no secret of the fact that he is, and has always been, an adamant opponent of Michigan's Medical Marijuana Act (MMMA). On January 5, 2011, AG Schuette capitulated to the United States demands stating that, "DCH will comply with a valid order from this Court requiring DCH to comply with the DEA subpoena." (See AG reply to U.S. petition: pages 2 – 3)

Applicants filed their Emergency Motion to Intervene as a Respondent and for Stay of Proceedings on January 11, 2011. The United States filed their Answer to Motion to Intervene on January 25, 2011, and advised that the DEA subpoena:

> … **as narrowed … is only [seeking] copies of the registry cards themselves, and any applications that are given the effect of registry cards**… **Although the description of the information sought by the subpoena is broad enough to include medical information, the DEA will voluntarily narrow the subpoena to exclude any medical certifications.** (See page 17, 19, 20 & 22 & of U.S. Answer to Motion to Intervene) [emphasis added]

It is disturbingly apparent that the United States is still arguing that the DEA is entitled to utilize their administrative subpoena powers to indiscriminately obtain documents containing the names of physicians throughout Michigan who have recommended medical marijuana therapy to their patients. **The United States claims that, "This case does not involve any action against**

a physician, and any such concern is entirely hypothetical.” (See page 22 of U.S. Answer to Motion to Intervene)

If the DEA is successfully with their overly-broad and unreasonable subpoena tactics, medical marijuana patients, cargivers and physicians in Michigan will no longer have any faith that, “Applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.” See: MCL 333.26426(h)(1). The federal government’s investigation of these types of confidential physician/patient/caregiver communications will undeniably cause an unwarranted and unlawful chilling effect on protected speech. (See *Conant v Walters*, 309 F.3d 639 (9th Cir. 2002); and pages 14 - 15 of Applicants’ original motion to intervene)

II. APPLICANTS HAVE STANDING AND ARE ENTITED TO INTERVENE AS OF RIGHT OR, ALTERNATIVELY, TO INTERVENE PERMISSIVELY

The Supreme Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2), see *Cascade Natural Gas Corp. v. El Paso Natural Gas Co*., 386 U. S. 129, 135 (1967). The Second, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits have adopted the general rule that proposed intervenors need not necessarily demonstrate standing to intervene in an ongoing controversy. See *Dillard v. Chilton County Com'n*, 495 F. 3d 1324 (11th Cir 2007);- *San Juan County v. United States*, 420 F.3d 1197, 1204-05 (10th Cir.2005) (permitting intervention without an independent showing of standing); *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir.2001) (same); *Ruiz v. Estelle*, 161 F.3d 814, 829-30 (5th Cir.1998) (same); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir.1991) (same); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978) (same).

The Sixth Circuit has adopted a permissive approach to the technical requirements of Fed.R.Civ.P. 42(c), at least when the parties are on notice regardingthe proposed intervenor's cliams and positions. "An intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing." See *Providence Baptist Church v. Hillandale Committee*, Ltd., 425 F.3d 309, 315 (6th Cir. 2005); The "length of time preceding the application during which the applicant knew or reasonably should have known of its interest" requires proposed intervenors to have "actual knowledge" or "reasonably should have known" of their interest in the case, specifically, "of the risk that [their] interest may be affected by the litigation, and that [their] interests may not be fully protected by the existing litigants." *Stoots v Memphis Fire Dept*., 679 F.2d 579, 582-83 (6th Cir. 1982) (citations omitted)

The Sixth Circuit has adopted "a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *Bradley v Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987).

In *Northland Family Planning Clinic, Inc v. Cox*, 47 F3d 323 (2007), the Sixth Circuit affirmed a district court's finding that the association did not have standing to intervene because they did not have an adequate legal interest to intervene and that Michigan's Attorney General would fully protect its interests.

The Applicants in this case are entitled to intervene as of right because they (1) filed their motion to intervene in a timely manner; (2) have a substantial legal interest in the subject matter of the case; (3) will not be able to adequately protect that interest and it may be impaired in the absence of intervention; and (4) have clearly shown that that the parties to this action will not adequately represent its interest in this matter. Applicants further rely on their statement regarding the nature their interest in this case. (See pages 5-6 of Applicants' motion to intervene)

Unlike the proposed intervenors in *Northland*, the Applicants seeking intervention here have a clear legal interest in the subject matter of this case. Applicants and their membership were intricately involved in the drafting of Michigan Medical Marijuana Act and its passage. Further, the *Northland* Court found that Michigan's Attorney General was fully protecting the proposed intervenors' interests in an anti-abortion law they supported. In this case, however, Michigan's current Attorney General has clearly shown that, for personal reasons, he will refuse to even contest the obviously overly-broad and unreasonable subpoena at issue here.

To satisfy the element of inadequate representation, proposed intervenors need not show that the representation of their interests will be inadequate, only that there is a potential for inadequate representation or that the existing parties will not make the same arguments as the proposed intervenors. The showing required is minimal. *Grutter v. Bollinger*, 188 F.3d 394 - 400 (6th Cir. 1999); *Jansen v. City of Cincinnati*, 904 F.2d 336, 341 (6th Cir. 1990).

A presumption of adequate representation exists only when the proposed intervenor shares the same ultimate objective as a party to the suit. *United States v. Michigan*, 424 F3d 438, 443 (6th Cir. 2005) (interest of private parties adequately represented by State of Michigan). Therefore, **Applicants only need show that "there is a potential for inadequate representation."** *Grutter*, supra at 400. [emphasis added] And, **the "rules governing intervention are 'construed broadly in favor of the applicants.'"** See: *Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). As noted in *Grutter*, **"Even if it could be said that the question raised is a close one, close cases should be resolved in favor of recognizing an interest under Rule 24(a)."** *Id*. at 399 (internal quotations omitted) [emphasis added]

Although permissive intervention "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation," *SEC v. United States Realty & Improvement Co*., 310 U. S. 434, 459 (1940), **it plainly does require an interest sufficient to support a legal claim or defense which is "founded upon [that] interest".** *Id*., at 460.

In addition to the above cited cases - and in an effort to remain within the allowable page limits for a response - Applicants asks that this Court consider the following pertinent case citations supporting Applicants' intervention of right or permissive intervention: *Linton v. Comm'r of Health & Env't*,, 973 F.2d 1311, 1319 (6th Cir. 1992); *Martin v. Wilks*, 490 U.S. 755 (1989); *Friends of the Earth, Inc. v. Laidlaw Envtl. Sevs. (TOC), Inc*., 528 U.S. 167, 181 (2000); *Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989).

III. THE DEA'S OVERLY-BROAD AND UNREASONABLE SUBPOENA SHOULD BE QUASHED AS IT IS AN UNWARRANTED INTRUSION INTO MEDICAL PRIVACY

"[T]he Fourth Amendment mandates a showing of probable cause for the issuance of search warrants, **subpoenas are analyzed only under the Fourth Amendment's general reasonableness standard**." *Doe v. United States*, 253 F.3d 256, 263-64 (6th Cir. 2001). This principle extends to subpoenas to third-parties — that is, entities other than the subject of the investigation. See *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993). *Phibbs* makes explicit, however, a necessary Fourth Amendment caveat to the rule regarding third-party subpoenas: **the party challenging the subpoena has "standing to dispute [its] issuance on Fourth Amendment grounds" if he can "demonstrate that he had a legitimate expectation of privacy attaching to the records obtained."** *Id*.; see also *United States v. Miller*, 425 U.S. 435, 444 (1976).

Turning to the instant case, this Court should have little difficulty finding that individuals maintain a reasonable expectation of privacy in information that was submitted to MDCH by medical marijuana patients who are applying for registry ID cards. The content of the records that medical marijuana patients send to MDCH is something that the patients "seeks to preserve as private," and therefore "may be constitutionally protected." *Katz v. United States*, 389 U.S. 347 (1967).

The administrative rules promulgated by the MDCH pursuant to Section 5 of the MMMA, MCL 333.26425, contain broader language than the confidentiality provisions within Section 6(h) of the MMMA. Rule 333.121(1) states that "[e]xcept as provided in subrules (2) and (3) of this rule, Michigan medical marihuana program information shall be confidential and not subject to disclosure in any form or manner."

IV. THE UNITED STATES IS ATTEMPTING TO RENDER THE APPLICANTS' UNDERLYING CLAIMS MOOT BY MAKING UNILATERAL CONCESSIONS REGARDING THE DEA SUBPOENA

In their Answer to Motion to Intervene, the "United States assumes that the request for stay is moot since the Court postponed the hearing until February 1, 2011." (See footnote 1 of U.S. answer) Applicants contest this notion and affirmatively state that their request for a stay of these proceedings is not moot because the Applicants' prayer for relief, "also request[s] a stay of proceedings from this Court so that they have an opportunity to more fully set forth the claims and defenses for which intervention is sought." (See pages 2 & 16 of Applicants' motion)

The United States has proffered no evidence that would indicate how or why Applicants' request for a stay of proceedings is moot. Further, they fail to show how a stay of proceedings would adversely impact their interest in this case.

In *Rosales-Garcia v. Immigration and Naturalization Service,* 322 F.3d at 396 (2003), the Sixth Circuit explained this history of the mootness exception:

> Two other strands of the Supreme Court's mootness jurisprudence support this conclusion. First, the Supreme Court has held that **"[i]t is well settled that** `a defendant's **voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.**' ... `**[I]f it did, the courts would be compelled to leave [t]he defendant... free to return to his old ways.'"** *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc*., 455 U.S. 283, 289 & n. 10, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). Second, **the Court has long recognized an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." This exception applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."** *Spencer*, 523 U.S. at 17, 118 S.Ct. 978 (quotation omitted); see also *Suster v. Marshall,* 149 F.3d 523, 527 (6th Cir.1998), cert. denied, 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 788 (1999).
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> To determine whether a case has been mooted by the defendant's voluntary conduct, the Supreme Court has articulated the following standard: **"A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."** *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693. … We have noted that **"cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties."** *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir.1990) (quoting 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533.7 (2d ed.1984)).

It is highly likely that the DEA will continue to issue overly-broad subpoenas for confidential and private medical records to Michigan's Department of Community Health. Therefore, the Applicants' claims and defenses clearly meet the "capable of repetition, yet evading review" mootness exception outlined by the Supreme Court. There is more than a reasonable expectation that the DEA will continuously seek to subvert the sovereignty of Michigan's Medical Marijuana Act and its mandated confidentiality provisions.

To determine whether a case has been mooted by the United States' voluntary conduct, the Supreme Court has articulated the following standard: "**A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.**" *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693.

The controversies at issue in this case are unquestionably capable of repetition and will always evade review, unless this Court intervenes. There should be no doubt that Michigan's newly elected Attorney General is determined to capitulate to the whims of DEA agents who will relentlessly abuse their subpoena powers in a concerted effort to eviscerate the confidentiality mandates within Michigan's Medical Marijuana Act. Therefore, this case meets the mootness exception for those cases "capable of repetition, yet evading review."

CONCLUSION

The Michigan Association of Compassion Clubs and their numerous member affiliates are undeniably a public interest group that was involved in the process leading to adoption of legislation and they have a cognizable interest in defending that legislation. Applicants' intervention in this case will certainly promote judicial economy. If Applicants are not allowed to intervene, they may be forced to file their own lawsuit seeking an injunction to vindicate their interests. Such a lawsuit would require another court to master the facts of this complex case, hear argument and render decisions on similar or identical legal matters, and integrate the relief granted in this case with the relief granted in that case. Judicial economy and swift resolution of disputes urge that Applicants' interests be addressed in this primary action.

Like the intervenors approved by the Sixth Circuit in *Grutter*, Applicants believe that there is an absolute certainty that the parties in this case will inadequately represent the proposed intervenors' interests, because they are subject to internal and external institutional pressures that may prevent them from articulating some of the constitutional and other legal arguments that the Applicants' intend to present.

As shown above and within Applicants' original motion to intervene, this motion is timely. Further, Applicants' claims or defenses absolutely have questions of law and facts in common. Here, the inclusion of the Applicants will only sharpen and clarify the issues for the Court. Accordingly, permissive intervention should be granted if intervention by right is not.

If the United States was really so worried about protecting the public interest in their prompt and effective investigation and enforcement of the Controlled Substance Act in this case, you would have to believe that they wouldn't have waited over six months to petition this Court to enforce the DEA's subpoena. It is the United States that is fully responsible for any delays in these proceedings.

WHEREFORE, Applicants pray that this Court stay these proceedings and use its discretion to allow Applicants to intervene as of right or grant a permissive intervention.

Respectfully submitted,

Dated: January 31, 2011

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